Supreme Court, U.S.
FILED

No. (1)

IN THE 95 1362 FEB 26 1996

Supreme Court of the United States

October Term, 1995

DANNY TAM,

Petitioner,

against

CONTINENTAL INSURANCE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard "looking at all the circumstances" as stated in *Harris v. Forklift Systems, Inc.*, could be interpreted to include satisfying other standards of "Title VII" plaintiff's burden, such as those cited in *Andrews v. City of Philadelphia.*

2. Whether the "reasonable person" standard to determine harassment established in *Harris v. Forklift Systems, Inc.*, could be interpreted to also include the intention of the maker of the comments, as stated "The question here is not whether plaintiff understood the term to be racist, but whether the speaker meant it to be so" in *York v. Mobil Oil Corp.*

3. Whether summary judgment proceeding, which only allows plaintiffs to submit a single brief prior to defendants' final of two (2) briefs, deny "Title VII" plaintiffs the right, as stated "plaintiff must be given the opportunity to come forth with sufficient evidence to show that the legitimate reasons offered by the defendant should not be believed ...", as required to satisfy "Title VII" plaintiff's burden in *McDonnell Douglas v. Green.*

4. Whether the testimony of a "Title VII" plaintiff alone can defeat a defendant's motion for summary judgment.

5. Whether the evidence submitted by Petitioner satisfy the standard "looking at all the circumstances" to bring an actionable "Title VII" claim to trial and defeat a motion for summary judgment.

LIST OF ALL PARTIES

Pursuant to Rules of the Supreme Court of the United States 14.1(b) and 29.6, the following is a list of all parties to the proceeding in the Court of Appeals for the Third Circuit:

1. **DANNY TAM**, Plaintiff/ Appellant/ Petitioner;

2. **THE CONTINENTAL INSURANCE COMPANY**, Appellee;

3. **PARENT CORPORATIONS OF APPELLEE**;
   The CNA Financial Corporation
   The Continental Corporation

4. **SUBSIDIARIES OF APPELLEE**;
   AFCO Agent Service Corporation
   Bayside Management Company, Inc.
   Bayside Reinsurance Company, Ltd.
   Boston Old Colony Insurance Company
   Buckeye Union Insurance Company (The)
   California Central Trust Bank Corporation
   Casualty Insurance Company
   Commercial Insurance Company of Newark, N.J.
   Connaught Insurance Company, Limited
   Continental Asset Management Corp.
   Continental Center Associates
   Continental Corporate Realty Services, Inc.
   Continental Guaranty & Credit Corporation
   Continental Holding Corporation
   Continental Insurance Holdings (Europe) Limited (The)
   Continental Insurance Company of New Jersey (The)
   Continental Insurance Company (Europe) Limited (The)
   Continental Insurance Company of Puerto Rico (The)
   Continental Insurance Management Limited

Continental Insurance (International Agencies) Australia Pty Limited
Continental International Insurance, Limited
Continental Life (Europe) Limited
Continental Life Insurance PLC
Continental Life (International) Limited
Continental Life Unit Trust Management Limited
Continental Lloyd's Insurance Company
Continental Loss Adjusting Services, Inc.
Continental Maiden Lane, Inc.
Continental Management Services Ltd.
Continental Pacific (Australia) Holdings Limited
Continental Pacific Insurance Company (Australia) Limited
Continental Rehabilitation Resources, Inc.
Continental Re Management Inc.
Continental Reinsurance Corporation
Continental Reinsurance Corporation International Limited
Continental Reinsurance Corporation (U.K.) Limited
Continental Reinsurance Management Company Limited
Continental Reinsurance Management Holding Company Limited
Continental Reinsurance Technical Risk Management Limited
Continental Risk Services (Barbados) Ltd.
Continental Risk Services, Ltd. (Bermuda)
Continental Service Plan, Inc.
Continental Solution, Inc.
Continental Subsidiary Corporation
Continental Vision Financial Services, Inc.
CPI Group Incorparated (The)
CPI Pension Services Inc.
Ctek, Inc.
Davis & Company Pty., Ltd.
East River Insurance Company Ltd.

East River Insurance Company Ltd. (Bermuda)
Elizabeth Insurance Co. Limited
Fidelity and Casualty Company of New York (The)
Fireman's Insurance Company of Newark, New Jersey
First Benefit Services, Inc.
First Fire & Casualty Insurance Company of Hawaii, Inc.
First Indemnity Insurance of Hawaii, Inc.
First insurance company of Hawaii, Ltd.
Glens Falls Insurance Company (The)
Global Management Consultants, Inc.
Hongkong Fire Insurance Co., Ltd. (The)
Hull & Cargo Surveyors, Inc.
Hull & Cargo Surveyors, Inc. (Canada)
IDBI Managers, Inc.
Kansas City Fire and Marine Insurance Company
LCI Finance Limited
LIG Investments Ltd.
Lombard Continental Insurance Holdings Limited
Lombard Insurance Services Limited
Maiden Lane Syndicate Inc. (The)
Marine Office of America Corporation
Marine Office of America Corporation (Canada)
Marine Office of America (Deutschland) GmbH
Marine Office of America Corporation Italia, Spa
Marine Office of America Corporation (U.K) Ltd.
Marine Office of Asia Corporation (Hong Kong) Limited
Master Capital Corporation
Mayflower Insurance Company, Ltd. (The)
MOAC Insurance Managers (Singapore) Pte Ltd.
National-Ben Franklin Insurance Company of Illinois
Niagara Fire Insurance Company
North Pearl Management, Inc.
Pacific Insurance Company
Pacific Underwriters, Inc.
Pension/Profit Sharing Systems, Inc.
Settlement Options, Inc.

South Place Syndicate Inc. (The)
TCC Acquisition Corp.
TCC Holdings, Inc.
TCC Properties Inc.
UAM Limited
Unionamerica Management Co. Limited
United States P & I Agency, Inc.
Worker's Compensation and Indemnity Company of California
Zeuxis Corp. VII

5. **MINORITY-OWNED AFFILIATES OF APPELLEE.**

Accord Holdings, Inc.
Adjustadores Dominicanos (Dominican Republic)
All America Marine Slip
Asia Financial Holdings Limited
Asia Insurance Co. Ltd.
Associated Aviation Underwriters
Bishophouse Limited (Bermuda)
CRC Suramericana S.A. (Venezuela)
Pan Malayan Ins. Corp.
Represetaciones Continental, S.A. (Spain)
Saudi Continental Insurance Company, E.C. (Saudi Arabia)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The judgment order by the Court of Appeals for the Third Circuit to affirm the District Court's judgment is attached beginning at page 1a of the Appendix. The district court's memorandum and order to grant defendant summary judgment is attached beginning at page 3a of the Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 27, 1995. App. at 1a-2a. This petition is filed within 90 days after entry of the judgment by the Court of Appeals for the Third Circuit. *See* Sup. Ct. R. 13.1, 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. 1254(1).

STATUTORY PROVISION

The pertinent portions of the statutory provisions involved in this case are as follows:

1. 42 U.S.C. 2000e-2

> (a) Employment practices
> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

2. 42 U.S.C. 2000e-3

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
>
> It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioner Danny Tam was a former employee of Continental Insurance (hereafter "Continental") from July 1988 to December 1991. Petitioner was subjected to repeated harassment and unfair employment conditions from April 1989 to September of 1991, while working in Continental's ISG department. The August 9, 1991 notice of reduction to plaintiff's salary adjustment was the watershed event that led to Petitioner's filing of the EEOC charges in August 12, 1991. An unfair salary adjustment that the District Court did not dispute even in its Memorandum And Order to grant summary judgment to Continental.

Petitioner had pointed to evidence on record that immediately after the EEOC filing, Continental had: only offered to transfer Petitioner despite Petitioner's expressed career decision to remain in the Investment Systems Group; publicly accused Petitioner of sabotage, in which Petitioner had to prove his

innocence; threatened to search Petitioner's belongings for stolen property prior to his transfer; steered Petitioner to a department which was eliminated only several weeks after his transfer. In December of 1991, Continental singled out petitioner's workstation for dismantling while he was still an employee. In addition, Petitioner had pointed to irrefutable (hand-written) evidence that Continental had falsely reported to Rights Associate that Petitioner had "filed an EEO complaint when he did not get a posted job", for which Continental has yet to provide any legitimate reasons. Continental's actions are a clear violation of 42 USC 2000e-3.

Petitioner was terminated from Continental in December 1991. After the EEOC denied Petitioner's request to re-open and investigate his case, Petitioner filed a "Title VII" complaint pro se in the District Court of New Jersey on January 30, 1992. (App. 22a)

A "discovery" process followed in which Petitioner responded to interrogatories, submitted request documents, and attended all depositions at Continental's requested in good faith. While Continental denied Petitioner most of the information requested using a slew of excuses (e.g. attorney-client privilege, confidentiality, unduly burdensome). Continental also proffered unsubstantiated medical reasons for Mr. Malinowski (one of the makers of harassing comments) not to be available for deposition. The requested information that Continental did submit was often incomplete and/or illegible. To deny Petitioner information on competing candidates for a promotion (applied in March 1991) that Petitioner was denied, evidence on record shows Continental submitted a falsified statement under oath (notarized) claiming "No interviews for the positions were conducted by Doug Walters" in its response to Petitioner's interrogatories and document requests. Continental later exposed its own falsified statement by presenting excerpts from Petitioner's interview with Doug Walters in its arguments in the District

Court. This and other unethical tactics used by Continental to obtain summary judgment are concisely documented by Petitioner in the Court of Appeals for the Third Circuit.

On 9/22/93, Continental submitted a motion for summary judgment to the District Court. On 2/10/94, Petitioner submitted a Memorandum In Opposition to Motion for Summary Judgment to the District Court. On 4/1/94, Continental submitted further arguments and claims in its second and final brief to the District Court, Reply Memorandum Of Law In Support Of Defendant's Motion For Summary Judgment. Petitioner was shock that under the summary judgment proceeding, plaintiff is only allowed a single brief in between defendant's first and final briefs. The summary judgment proceeding effectively denied "Title VII" plaintiffs the opportunity to dispute the false and misleading claims in defendants' final brief to the District Court. Based on Continental's false and misleading claims, which Petitioner was not allowed to dispute, the District Court entered an Order to grant Continental Summary judgment on 1/5/95.

The evidence in the record is entirely contrary to Continental's arguments and the District Court's decisions are based on misapprehended facts. A review of each of Petitioner's claims further illustrates the error of the court's decision.

As to Petitioner's harassment claim, the District Court accepted Continental's partial list as complete, despite Petitioner's submitted argument to the contrary. Petitioner had pointed to evidence on record, which clearly show that Continental misrepresented a partial list of harassment as complete in persuading the District Court to grant it summary judgment.

As to Petitioner's potential transfer claim, evidence on record shows Petitioner's promised position (by Kieffer), which was not subjected to any transfer, was reassigned to another white

employee only a couple of weeks prior to Kieffer placing Petitioner on involuntary transfer. In granting Continental summary judgment, the District Court stated "Plaintiff has also failed to produce any factual evidence to suggest that the list was compiled with a discriminatory motive." (App. 13a) Evidence on record (Tam Aff., Exhibit 10) shows Petitioner's name was not on the list of the three (3) employees to be transferred. Therefore, Petitioner did not attempt and had no reason "to produce any factual evidence to suggest that the list was compiled with a discriminatory motive."

As to the unfair assignment claim, the District Court failed to consider Petitioner's argument that Petitioner's programming co-workers all had years of experience in performing programming and on-call duties, while Petitioner had no training or experience in such assignments. Petitioner had pointed to evidence on record, that Petitioner's other co-workers whom did not have such experiences were not assigned on-call duties or programming assignments. Petitioner was discriminatory singled out and set up for failure by given new assignments and responsibilities without any training. The District Court misunderstood the evidence submitted in granting Continental summary judgment by stating: "First, plaintiff has failed to present any facts that would show that other similarly situated employees were treated differently. In fact, plaintiff's own submissions demonstrate that he shared on-call duties with his non-Chinese colleagues." (App. 13a)

As to Petitioner's performance review claim, Continental submitted arguments denying Kieffer failed to follow published company policy to set performance objectives for Petitioner, allowing him to give unfair assignments to Petitioner without training (i.e. programming assignments and on-call duties). Petitioner had pointed to evidence on record, that the objectives Continental claimed Kieffer had set for Petitioner, were detail assignments Petitioner performed up to July 1991. Thus,

Continental's claim that these objectives were set by Kieffer in July 1990 (at the start of a performance period as required by written company policy), cannot possibly be true. In granting Continental summary judgment, the District Court failed to consider Petitioner's submitted argument "Kieffer violated company rules by failing to prepare an annual performance objective for Tam's July 1990 to June 1991 period."

As to Petitioner's unfair salary claim, the District Court did not dispute Petitioner's claim that Continental unfairly reduced Petitioner's salary adjustment, and should not have granted Continental summary judgment.

As to Petitioner's promotion claim, Continental pointed to Bilotti's Certified statements (Zimmerman Aff., Ex. F) to claim that the other competitor (McGowan) for the first QA Analyst promotion was better qualified. A careful review of Bilotiti's statements show that McGowan only worked in the Standard Procedure Unit of QA and was never a Quality Assurance Analyst. Petitioner worked as Quality Assurance Analyst for Citibank from 1984 - 1986, which by any reasonable standard made Petitioner more qualified. Thus, the District Court was incorrect to state "plaintiff's competitor for the position was better qualified." (App. 16a)

Petitioner's promotion claim included his application and interview (around late March 1991) with Douglas Walters for promotion. A promotion that Petitioner was denied (around April 1991) without explanation, even though Mr. Douglas Walters had informed petitioner during the job interview that Petitioner was qualified for the position. To deny petitioner all evidence pertaining to this application and interview for promotion, Continental submitted (in its response to Petitioner's interrogatories and document request) a falsified statement under oath (notarized) "No interview for the positions were conducted by Doug Walters." Continental exposed its own

falsified statement under oath, by including within its arguments to the District Court, excerpts from the very interview between Petitioner and Mr. Douglas Walters. In granting Continental summary judgment, the District Court did not fully consider Petitioner's claim. (App. 15a-16a) Irrefutable evidence on record shows Continental used unlawful means to obtain summary judgment.

As to Petitioner's training claim, Petitioner had pointed to evidence on record submitted by both Petitioner and Continental (Zimmerman Aff., Tam Dep. at 493, 500, 501.), that Kieffer allowed five (5) of Petitioner's white co-workers to go to training and vacation, only days after Kieffer publicly cursed Petitioner for taking previously scheduled company-required training. It was incorrect for the District Court to state "Nor can plaintiff produce any evidence to show that others similarly situated were treated differently", in granting summary judgment to Continental. (App. 16a)

As to Petitioner's retaliation claim, it was incorrect for the District Court to recite from Continental's brief, which lacked citation to an affidavit or other competent evidence, that Senior Vice President "Ken Burk never met and does not know plaintiff's national origin". The truth is, as witnessed by about a dozen of Continental's management staff, that Petitioner was sitting approximately 5 feet away from Ken Burk in a meeting in the Neptune office in November 1991.

In addition, Petitioner had pointed to irrefutable (hand-written) evidence submitted in the District Court that Continental had falsely reported to Right Associate that petitioner had "filed on EEO complaint for not getting a posted position". (Tam Aff., Ex. 43) This is a clear violation of 42 U.S.C. 2000e-3(a) by Continental in retaliation of Petitioner filing EEOC charges. Continental could not offer any business or economic reasons for such action in the lower courts.

In reciting Continental's arguments on which it relied in granting summary judgment, the District Court seriously misstates or misapprehends the facts. Petitioner had submitted arguments and pointed to evidence on record in the Court Of Appeals, that many of Continental's claims and arguments cannot possibly be true. The Court of Appeals for The Third Circuit inexplicably affirmed the District Court's ruling with the following statement: "After consideration of all contentions raised by appellant, it is ADJUDGED AND ORDERED that the judgment of the district court entered January 9, 1995, be and is hereby AFFIRMED. (App. 2a)

ARGUMENT

The focus of this appeal, as presented by the questions, is the interpretation and application of the cases and standards used in employment discrimination ("Title VII") summary judgment proceeding. In affirming the District Court's order to grant Continental summary judgment, the Court of Appeals for the Third Circuit has sanctioned overwhelmingly unfavorable interpretations of standards used in "Title VII" summary judgment, which conflict with this Court's prior opinions, and placed an even more difficult burden on "Title VII" plaintiffs.

Until the Court of Appeals' decision in this case, the standard for "burden of proof" in Summary Judgment (Rule 56), as stated in the Federal Rules of Civil Procedure (Note 947):

> Discrimination plaintiff is not required to offer some evidence other than subjective belief and is not required to put on one witness other than himself or herself in order to defeat motion for summary judgment or directed verdict; no rule of law exists that testimony of discrimination plaintiff standing alone cannot defeat motion for summary judgment. *Jackson v. University of Pittsburgh*, C.A.3 (Pa.) 1987, 826

F.2d 230, certiorari denied 108 S.Ct. 732, 484 U.S. 1020, 98 L.Ed.2d 680.

In its Order to grant Continental summary judgment, the District Court stated "Plaintiff has produced no evidence, apart from his own assertions, that his non-Chinese colleagues were not required to report their overtime." (App 14a) Continental did not deny that Petitioner's repeated claim was confirmed by Mark Rogers' deposition. Despite irrefutable (hand-written) evidence of retaliation (Tam Aff., Ex. 43) , the District Court stated "Plaintiff has not produced any evidence, beyond his conclusory allegations, that Continental acted in a discriminatory fashion." (App. 17a) In denying Petitioner's harassment claim, the District Court also stated "There is simply no evidence by plaintiff that other similarly situated employees would find these comments offensive to the degree required for a Title VII violation." (App 20a) These statements by the District Court contradict the current "Burden of Proof" standard set for "Employment" summary judgment (Federal Rules and Civil Procedures 56, Note 947), as shown above.

Petitioner had submitted arguments to the Court of Appeals that the District Court's ruling places an undue burden on "Title VII" plaintiffs in summary judgment proceeding, whom at times would lack witnesses and cannot obtain the needed evidence from defendants. The Court of Appeals' sanction of this ruling makes it unduly burdensome for future "Title VII" plaintiffs to defeat a motion for summary judgment. In affirming the District Court's judgment in this case, the Court of Appeals has set a new precedent that is contradictory to the current "Burden of Proof" standard (Note 947) in Federal Rules and Civil Procedures 56 (Summary Judgment). The lower courts' decisions, in effect holds that a "Title VII" plaintiff's testimony alone is not sufficient to defeat a motion for summary judgment, which conflict with this Court's prior opinion in *Jackson v. University of Pittsburgh*.

The opinion below also conflicts with this Court's opinion in *Harris v. Forklift Systems, Inc.*, (1993). In citing the *Harris v. Forklift Systems*' standard of determining "Title VII" violation by "looking at all the circumstances", the District Court incorrectly applied this standard to include plaintiff's burden to satisfy the five "constituents" defined in *Andrews v. City of Philadephia*, 895 F.2d 1469, 1482 (3d Cir. 1990). Continental submitted argument on page 43 of Appellee's Brief to the Court of Appeals, that this Court's decision on *Harris v. Forklift Systems* "only addressed the 'detrimentally affected' elements of a harassment claim (elements 3 and 4 above [*Andrews*]), and does not negate *Andrews*' applicability here. The District Court thus correctly applied the *Andrews* standards in dismissing Tam's claims for lack of evidentiary support." The District Court's application of the *Andrews* standards is an incorrect interpretation of the standard "looking at all the circumstances" standard stated in *Harris v. Forklift Systems*., for this Court's intention of *Harris v. Forklift Systems* was not merely to replace or clarify the "detrimentally affected" elements in *Andrews*. If all the evidence and circumstances had been considered, the evidence submitted by Petitioner to the lower courts should have satisfied the standards in either rulings.

The lower courts' interpretations also contradict the other *Harris v. Forklift Systems* standard of "no single factor is required". *Harris v. Forklift Systems*, __U.S.__, 114 S.Ct. 367, 370, 371 (1993) In the Court of Appeals, Petitioner submitted argument that the *Harris v. Forklift Systems* standard of "looking at all the circumstances" did not require "Title VII" plaintiffs to satisfy the standards in *Andrews*. The counter argument could be that the "looking at all the circumstances" standard did not exclude the standards in *Andrews*. In this respect, Petitioner had submitted arguments in the Court of Appeals that applying the five "constituents" standard contradict the other *Harris v. Forklift Systems* standard of "no single factor is required", and that including the *Andrews* standards conflicts with the spirit

and intention of this Court's ruling in *Harris v. Forklift Systems*, which is to make it less burdensome for "Title VII" plaintiffs to bring a case actionable under "Title VII".

The opinions below also contradict the "reasonable person" standard established by this Court in *Harris v. Forklift Systems*. In granting Continental summary judgment, the District Court cited *York v. Mobil Oil Corp.* (1991), "The question here is not whether plaintiff understood the term to be racist, but whether the speaker meant it to be so". (App. 19a) Petitioner had submitted arguments in the Court of Appeals that in the unanimous Supreme Court decision in *Harris v. Forklift Systems*, this Court stated: *It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to "ma(k)e it more difficult to do the job."* This clearly shows that the "reasonable person" standard to determine harassment should not be interpreted to include the intention of the "maker of the comment(s)" in *York v. Mobil Oil*, as cited by the District Court in granting Continental summary judgment. (App. 19a)

The lower courts' decisions actually increased "Title VII" plaintiff's burden in bringing employment discrimination cases to trial, and is inconsistent with the intention and spirit of this Court's unanimous decision in *Harris v. Forklift Systems Inc.* It is clear to see from this case that without more definitive guidelines, the "looking at all the circumstance" standard merely broaden the interpretation by the lower courts in deciding "Title VII" harassment claims. The "looking at all the circumstances" standard stated in *Harris v. Forklift Systems,* can now be interpreted to even dismiss "Title VII" cases that would have satisfied the previously more stringent *Andrews* standards.

In addition, The District Court had incorrectly accepted Continental's proffered "relationship" with individual(s), as "experience" and "qualification" that Petitioner lacked, in

denying Petitioner assignments and promotion claims. (App. 6a and 16a) In the Court of Appeals, Petitioner submitted arguments that Continental's repeated use of "relationship" with individual(s) as legitimate business reason for disparate employment decisions (e.g. assignments and promotion) should not be allowed. Petitioner had argued that such "relationships" are not bona fide occupational qualifications, thus cannot satisfy defendant's burden "to articulate some legitimate, non-discriminatory reason for the employee's rejection;", as cited in *McDonnell Douglas Corp. v. Green*, (1973).

The lower courts' opinions in this case lessen "Title VII" defendants' burden in obtaining summary judgment, and at the same time unduly places a more difficult burden on "Title VII" plaintiffs.

In the Court of Appeals, Petitioner also submitted argument that the summary judgment proceeding unfairly deny plaintiffs the right to challenge defendant's arguments (in defendant's final brief). The summary judgment proceeding contradicts the standard set by this Court's ruling in *McDonnell Douglas v. Green* and denies Title VII plaintiffs "... the opportunity to come forth with sufficient evidence to show that the legitimate reasons offered by the defendant should not be believed and that discrimination was a determinative factor for the adverse employment action." as stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

The current summary judgment proceeding provided an obvious unfair advantage to the "Title VII" defendant. While the "Title VII" plaintiff is only allowed a single response to defendant's first brief (motion for summary judgment) and not permitted to dispute the claims and arguments in defendants second and final brief in the District Court. By allowing defendants two briefs (the first and last), the current summary

judgment process not only let the defendants set the issues of the arguments, but also let its arguments contained in its final brief to go unchallenged in persuading the courts to grant defendant summary judgment. Petitioner had submitted argument in the Court of Appeals that such a proceeding is unfair and deny "Title VII" plaintiffs due process.

To obtain summary judgment, Continental exploited the inconsistency between the plaintiff's burden as stated in *McDonnell Douglas v. Green*, and the summary judgment proceeding that only allowed plaintiffs a single brief. By restricting plaintiffs to a single (2nd) brief, the summary judgment proceedings deny "Title VII" plaintiffs their right to satisfy plaintiff's burden "... plaintiff must be given the opportunity to come forth with sufficient evidence to show that the legitimate reasons offered by the defendant should not be believed and that discrimination was a determinative factor for the adverse employment action." as established by this Court in the "three-pronged analysis" for "Title VII" cases in *McDonnell Douglas v. Green*.

Defendants' overwhelming advantage in the summary judgment proceeding virtually command "Title VII" defendants to routinely seek summary judgment in the District Court, especially in light of being able to present arguments unchallenged by plaintiffs. In the summary judgment proceeding, the defendants have the undue advantage to present its first brief of arguments (which dictates the issues and the scope of the arguments) and the last brief of arguments (which go unchallenged by the plaintiffs). At the same time, plaintiffs are only allowed a single brief in between. These conditions make the outcome of motions for summary judgment less dependent on evidence, and more dependent on the amount of financial resources and legal tactics deployed, which typically and overwhelmingly favors the "Title VII" defendants over the plaintiffs. In most cases, to dispute defendants' unchallenged

arguments and "legitimate reasons", the financially disadvantaged "Title VII" plaintiff must pursue the legally and financially burdensome "appeals" process, which contains the added requirement to demonstrate that the court erred in its decision.

The current summary judgment proceeding makes the burdensome appellate process virtually an integral part of "Title VII" cases for plaintiffs. This is unduly burdensome for "Title VII" plaintiffs, who usually do not have the financial resources to pursue the appellate process, much less the proper legal representation to do so. The appellate process would not have been necessary if Petitioner had been allowed to show in the District Court, that the evidence on record could prove Continental's claims and arguments should not be believed (including those contained in its last and unchallenged brief), and thus satisfied the standards for "Title VII" claims.

CONCLUSION

Petitioner had pointed to permissible evidence that Continental had misrepresented a partial list of harassment as complete in the District Court, and denied Petitioner pertinent evidence by submitting a falsified statement (under oath) in its response to Petitioner's interrogatories and document requests. By withholding evidence and omitting the more racially egregious comments, Continental persuaded the District Court to grant it summary judgment based on the self-serving arguments, that plaintiff lacked sufficient evidence and harassment did not rise to the level of "Title VII" violation.

Continental exploited a summary judgment proceeding that allows defendants an overwhelming 2-to-1 advantage in presenting its case over "Title VII" plaintiffs, which allowed Continental's final brief to be submitted in the District Court unchallenged by Petitioner. To "level the field", the summary judgment proceeding should be amended to at least allow "Title

VII" plaintiffs a chance to dispute the arguments presented in defendants' last and final brief. This will allow the plaintiffs "... the opportunity to come forth with sufficient evidence to show that the legitimate reasons offered by the defendant should not be believed..." in compliance with "Title VII" plaintiff's burden stated in *McDonnell Douglas v. Green*. Without amending the summary judgment proceeding, the burdensome appellate process becomes the only option for "Title VII" plaintiffs to satisfy its burden as stated in *McDonnell Douglas v. Green*.

The current "Title VII" standard as established by this Court in *Harris v. Forklift Systems* is statutory too vague and overly board, which may lead to unintended and drastically inconsistent interpretations by the lower courts. As evident by the lower courts' decisions in this case, the *Harris v. Forklift Systems* ruling did not lessen the burden for "Title VII" plaintiffs as had intended, but only broaden the interpretations by the courts. Without more definitive guidelines for the *Harris v. Forklift Systems* ruling, "Title VII" cases that would satisfied even the previously deemed restrictive "detrimentally affected factors" can now be summarily dismissed with unforeseen interpretations of the "looking at all the circumstances" standard. The lower courts' interpretations and opinions in this case regress from this Court's unanimous decision in *Harris v. Forklift Systems*, and represent a major setback for "Title VII" plaintiffs. The interpretations and opinions below in this case, place an even more difficult burden on "Title VII" plaintiffs than prior to this Court's decision in *Harris v. Forklift Systems*. For the standard "looking at all the circumstances" allows for interpretations unfavorable to "Title VII" plaintiffs that were not available before.

In granting Continental summary judgment, the Court of Appeals rendered a decision that conflicts with prior decisions of this Court, thereby creating a precedent that may affect future "Title VII" plaintiffs. Petitioner respectfully requests that this Court grant review of this case to protect the integrity of the

judicial system, to resolve the conflicts created by the lower courts' decisions, and to prevent the denial of future "Title VII" plaintiffs' right as stated in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). Upon review of this case, Petitioner hopes that this Court reverse the decision of the Third Circuit and allow Petitioner the right to present this case in trial.

Respectfully submitted,

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Judgement Order of the Court of Appeals Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5098

DANNY TAM,

Appellant

v.

CONTINENTAL INSURANCE

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 92-cv-00411
(Honorable Mary Little Parell)

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 14, 1995

Before: BECKER and SCIRICA, Circuit Judges
and COHILL, District Judge*

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*The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered January 9, 1995, be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Memorandum and Order of the United States District Court for District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANNY TAM,

CIVIL ACTION NO.:92-411 (MLP)

Plaintiff,

v. **MEMORANDUM AND ORDER**

CONTINENTAL INSURANCE,

Defendant.

PARELL, District Judge

This matter comes before the Court on motion of defendant for summary judgement pursuant to Fed. R. Civ. P. 56(c). Plaintiff opposes the motion. For the reasons stated, the motion is granted.

BACKGROUND

On January 30, 1992, plaintiff Danny Tam ("plaintiff"), a Chinese-American, filed a Complaint against his former employer, the Continental Insurance Company ("Continental" or "defendant") alleging, inter alia, race and national origin discrimination in violation of Title VII of the Civil Rights Act

of 1964 ("Title VII"), as amended, 42 U.S.C.A. §§ 2000e to 2000e-17 (1981 & Supp.1994).[1] Plaintiff worked for Continental from July, 1988 until December, 1991, when plaintiff's entire unit was eliminated due to an economically-necessitated reduction in force. The Complaint alleges that, while at Continental, Plaintiff was subjected to constant harassment, denied promotions, training opportunities and salary increases and was given unfair job assignments. (Complaint 9-10.) Plaintiff claims that this treatment was due to his race and national origin. (Id.) Defendant has moved for summary judgment on plaintiff's claims, arguing that: the retaliatory discharge claim is statutorily barred for failure to file with the EEOC; plaintiff is unable to establish a prima facie case of discrimination; even if plaintiff can make out a prima facie case, defendant has put forth legitimate nondiscriminatory reasons for its employment decisions.

This court has jurisdiction of this matter under federal question jurisdiction pursuant to 28 U.S.C. 1331.

FACTS

Plaintiff Danny Tam is a Chinese-American who was born in Hong Kong and moved to the United States when he was six

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[1]Section 703 of Title VII provides: It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hore or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviledges of employment, because of such individual's . . . race . . . national origin . . . 42 U.S.C.A. §2000e-2(a)(1) (West 1981). Section 704 of Title VII provides: It shall be an unlaful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge . . . under this subchapter. Id. §2000-3(a) (West 1981).

years old. (Affidavit of Sandra L. Zimmerman ["Zimmerman Aff."], Exhibit C: Deposition of Danny Tam, at 5, 137.) In July, 1988, plaintiff began work at Continental's Cranbury, New Jersey, office as a grade 45 Consultant Programmer/Analyst in the Investment Services Group ("ISG"). (Id. at 37-38.) Plaintiff originally worked on a computer project called IMIS. The team consisted of Project Manager Martin Felder, outside consultant Don Kieffer, analyst Mark Rogers, and plaintiff. When Felder left the group in December 1988, Kieffer replaced him as project manager. In April, 1989, Mike Malinowski, another analyst, joined the IMIS group. Felder (and subsequently) Kieffer served as plaintiff's superiors. (Id. at 35, 41, 51, 139.)

Plaintiff contends that Malinowski frequently directed derogatory racial remarks at plaintiff.[2] Plaintiff also contends

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[2] Plaintiff's co-worker, Malinowski, allegedly made the following comments: (a) at a meeting of plaintiff, Kieffer, Rogers and Malinowski, Malinowski said "you know how sneaky orientals think"; (b) after Tam told a joke, Malinowski remarked, "great, we got a Chinese comedian here"; (c) Malinowski stated that in 1989, plaintiff had "pearl-harbored" Malinowski's vacation; (d) Malinowski mocked a Chinese accent and said "call me master Tam"; (e) Malinowski asked Tam at a Christmas party whether they celebrate Christmas in China; (f) Malinowski twice joked that if Continental cancelled the computer project, Tam could open a hot dog stand but only use slanted rolls; (g) Malinowski asked Tam to spell something and said, "imagine, I'm asking a guy from Hong Kong to help me with my spelling"; (h) Malinowski pulled back the corner of his eyes and said "I want to come in as Danny tomorrow"; (i) Malinowski stated during the Gulf War that the USA should "kill them all and let God sort it out"; (j) Malinowski told co-workers to watch out because the ISG vice-president , who is Asian, was Tam's gardener.

Plaintiff also contends that his supervisor Kieffer made the following comments: (a) asked whether Tam's wife was an athletic supporter; (b) stated that he could not distinguish between Japanese and Chinese culture; (c) joked

that his supervisors condoned these remarks and gave plaintiff the least desirable work assignments. (Pl's Br. at 3-4.)

In the summer of 1990, the IMIS team moved to Continental's Neptune, New Jersey, office to join the rest of Continental's Investment Services Group. At that time, Kieffer became supervisor of additional employees who were performing both programming and analysis work. Tam was given substantial programming work even though he expressed interest in doing analysis work instead. (Zimmerman Aff., Ex. C: Tam Dep. at 164-65.) Continental, however, contends that it had already assigned the analysis work to other employees who had experience that plaintiff lacked. (Id. at 42, 167, 314.) During this period, plaintiff's co-worker, Malinowski, arranged the "on-call" schedule and directed some of ISG's assignments. Plaintiff contends that Malinowski gave plaintiff the least desirable "on-call" times. (Pl.'s Br. at 6-7.)

Due to the consolidation of the IMIS team with the employees already at the Neptune office, Continental determined that the unit was overstaffed and that three individuals would be slated for transfer to other departments at Continental. (Zimmerman Aff., Ex. C: Tam Dep. at 329-330.) Plaintiff and two caucasians were chosen. Plaintiff objected to possible transfer because he

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about a auto accident Tam had in which Kieffer imagined Tam as an aviator yelling "Tora, Tora, Tora"; (d) laughed when Tam said "rule of dumb" instead of "rule of thumb." Also, plaintiff complained of an unnamed Continental official who referred to a yellow-bound regulatory report as the "yellow peril."

Plaintiff concedes that he laughed at or ignored all of these jokes except the "sneaky oriental" comment and the "pearl-harbored my vacation" comment. (Zimmerman Aff., Ex. C: Tam Dep. at 49-50, 55-58, 82-84, 87, 104-05, 108-110.) Plaintiff objected to the latter comment only because he objected to the suggestion that he cost Malinowski vacation days, which plaintiff contends was untrue. (Id. 105-06.)

feared he would not be able to perform other jobs. In October, 1990, Kieffer, plaintiff's supervisor, told him that he would not be transferred. The other two individuals were eventually transferred. (Id. at 273-74.)

Plaintiff continued to receive programming assignments as did other employees in the ISG unit. (Id. at 284-86.) Plaintiff complained that he was having difficulty with these assignments and would prefer doing analysis work instead. (Id. at 287-88, 92-94, 296-301.) Kieffer offered to help plaintiff and told him that others were also having difficulty. Plaintiff never complained that his assignments were related to his race or national origin. (Id. at 296-301.)

On July 10, 1991, plaintiff applied for a job in Continental's Quality Assurance division. He interviewed with Tony Bilotti, Assistant Vice President of the division. Bilotti suggested that plaintiff discuss the position with a few of the analysts in the division before continuing with the interview process. (Id. at 361-62.)

Several days later, on or about July 16, plaintiff received his annual performance review. Plaintiff received an overall score of 3 (in a 1-5 scale with 5 as highest score), which resulted in a 4% ($2,240.00) salary increase. (Zimmerman Aff., Ex. G: Tam 1991 performance review at 5.) Plaintiff had previously received a score of 3 in 1989 and 1990 but his salary increases were higher ($3,000.00 in both years). Plaintiff's evaluation suggested that plaintiff should work harder. (Id.)

Plaintiff contends that his supervisor neglected to factor in his overtime work and did so deliberately because he knew plaintiff was applying for the Quality Assurance position. Thus, plaintiff

argues that he received a discriminatory performance review in1991.[3] (Pl.'s Br. at 27.)

In an effort to improve his prospects for obtaining the Quality Assurance job for which he applied, plaintiff began a four-day training class on July 23, 1991. (Zimmerman Aff., Ex. C: Tam Dep. at 405-07.) When plaintiff returned to the office after the first day of the class, Kieffer, plaintiff's supervisor, publicly reprimanded plaintiff for not spending all his efforts on his assigned work, especially in light of his recent evaluation which encouraged plaintiff to work harder. (Id.) Nevertheless, plaintiff attended class the next day and the morning of the third day. On July 24, 1991, plaintiff discovered that he did not receive the Quality assurance position and dropped the class.[4] (Id. at 395-97, 405-07, 411-12.)

Plaintiff complained that the selection process for the quality assurance position was unfair, and on July 26, 1991, plaintiff met with Glenn Oppito, human resources manager, about his concerns. (Id. at 360-62.) On July 29, 1991, plaintiff also met with Barbara Burkepile, Assistant Vice-President of Human Resources. Burkepile explained to plaintiff that Bilotti believed plaintiff was not qualified to proceed further in the interview process. (Id. at 358-59.)

Plaintiff also reported to Burkepile that he was unhappy with his programming assignments and that he felt more at ease with analysis work. Burkepile set up a meeting with plaintiff's supervisor, Kieffer, to discuss these issues. When the three met sometime in August, 1991, Kieffer expressed his view that

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[3]Two of plaintiff's white co-workers, Mark Rogers and Pearl Goldstein, received a 3+ for 1991. (Tam Affidavit, Exs. 9,31.)

[4] The position went to Gwen McGowan, a black female, who had previously worked with Bilotti. (Zimmerman Aff., Ex. C: Tam Dep. at 355.)

everyone at Continental was expected to work outside the area of their expertise for certain periods of time, and that Kieffer intended to give plaintiff analysis work in the future. (Id. at 386-389, 421-428.)

On August 9, 1991, plaintiff received for his signature his salary adjustment form which reflected the 4% ($2,240.00) increase. Plaintiff did not believe this was a fair evaluation and on August 12, 1991, he filed a EEOC charge alleging race and national origin discrimination[5] (Zimmerman Aff., Ex. M: EEOC charge.)

Later in August, 1991, plaintiff again met with Burkepile. Burkepile advised plaintiff that Bilotti had a different position available in Quality Assurance and that plaintiff ought to apply for it. (Zimmerman Aff., Ex. C: Tam Dep. at 425-26.) Plaintiff met with Bilotti about the position. Bilotti invited plaintiff to apply, which plaintiff did. (Id. at 429-30.) Plaintiff was offered the position on September 12, 1991. (Zimmerman) Aff., Ex. N: job offer.) Plaintiff accepted the position, which included an 11% salary increase, and became a member of the quality assurance unit effective September 30, 1991. (Zimmerman Aff., Ex. C: Tam Dep. at 82-83.)

In December, 1991, Continental decided to eliminate a number of units, including the Quality Assurance unit. As a result, plaintiff, McGowan (who received the first quality assurance position) and nine other employees, including eight Caucasian-Americans, lost their job position. (Zimmerman Aff., Exs. O & P.) The decision to eliminate the unit was made by Ken Burk, the Senior Vice President in charge of the Neptune,

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[5]Plaintiff requested the EEOC to forego administrative investigative of the discrimination charge and to issue plaintiff a Right to Sue Notice, which EEOC issued October 30, 1991. (Zimmerman Aff., Ex. Q: EEOC charge.) No other EEOC charge was filed by plaintiff.

New Jersey office. Burk had never met plaintiff nor was he aware of plaintiff's race or national origin. Plaintiff was offered the option of seeking placement elsewhere in the company but he refused. (Zimmerman Aff., Ex. R: placement questionnaire.) Plaintiff left the company December 10, 1991 and obtained a job with Maritime Overseas Corporation in or about March, 1992. (Zimmerman Aff., Ex. C: Tam Dep. at 17-19.)

SUMMARY JUDGMENT STANDARD

A court shall enter summary judgment under Federal Rule of Civil Procedure 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In order to defeat a motion for summary judgment, the opposing party must establish that a genuine issue of material fact exists. Jersey Cent. Power & Light Co. v. Lacy Township, 772 F.2d 1103, 1109 (3d Cir. 1985), cert. denied, 475 U.S. 1013 (1986). A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (citing First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968)); Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. at 248.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1983), the Supreme Court established a basic framework

for analyzing the burdens of proof in employment discrimination cases.[6]

In Fuentes v. Perskie, 32 F.3d 759, 761-62 (3rd Cir. 1994), the Court of Appeals for the Third Circuit addressed a plaintiff's burden to forestall summary judgment in employment discrimination cases in light of the United States Supreme Court's recent decision in St. Mary's Honor Center v. Hicks, --- U.S. ---, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993):

> The question before us is the proper standard for granting summary judgment in a claim arising under Title VII in the wake of the Supreme Court's decision in [Hicks]. In particular, we consider the evidence that a plaintiff, who has made out a prima facie case, must adduce to survive a motion for summary judgment when the defendant offers a legitimate reason for its employment action in a "pretext" employment discrimination case. We hold that, to do so, the plaintiff generally must submit evidence which: 1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant

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[6]McDonnell Douglas implemented a three-pronged analysis, which is applicable in the summary judgment context and allocates the parties' burdens: (1) plaintiff must come forth with sufficient evidence to establish a prima facie case of discrimination; (2) if plaintiff succeeds in establishing a prima facie case, the burden then shifts to the defendant, who must articulate some legitimate, non-discriminatory reason for the employee's rejection; (3) if defendant is able to meet this burden, plaintiff must be given the opportunity to come forth with sufficient evidence to show that the legitimate reasons offered by the defendant should not be believed and that discrimination was a determinative factor for the adverse employment action. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1093-94 (1981).

> so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Id.

DISCUSSION

Plaintiff contends that he suffered harassment and disparate treatment because of his race and national origin in connection with various employment decisions made by Continental. The court will examine these allegations initially to determine whether plaintiff can establish a prima facie case, and , if so, whether defendant has articulated a legitimate nondiscriminatory reason for its decision. Should defendant articulate such reasons, the burden then falls upon plaintiff to point specific facts that could lead a reasonable factfinder to conclude that discrimination, and not the reasons forth by defendants, was the true reason for the employment decisions. Chauhan v. M. Alfieri Co., Inc., 897 F.2d 123, 127-28 (3rd Cir. 1990) ("the plaintiff seeking to defeat a summary judgment motion must produce or point to some evidence, in addition to the basic facts necessary to establish the prima facie case, indicating that the defendant's reason is pretextual.")

PLAINTIFF' S POTENTIAL TRANSFER

Plaintiff claims that he was singled out for involuntary transfer in July, 1990, when other non-Chinese colleagues were permitted voluntary transfer. Plaintiff also states that, had he been kept on the transfer list and not chosen by another department, he would have been discharged. (Pl.'s Br. at 28-29.)

The court finds that plaintiff has failed to establish a prima facie of discrimination based on these facts. Plaintiff admits

that he was removed from the transfer list at his request. As a result, he was not treated less favorably than other employees in a non-protected class; in fact, he appears to have been treated more favorably. (Tam Aff., Ex. 15: "e-mail" printout regarding transfer.) Moreover, plaintiff states in his deposition that he was told that he would not be discharged even if not chosen by another department. (Zimmerman Aff., Ex. C: Tam Dep. at 205.) Plaintiff has also failed to produce any factual evidence to suggest that the list was compiled with a discriminatory motive. In the absence of any facts that potential transfer was motivated by discriminatory animus, defendants motion for summary judgment is granted on this claim.

PLAINTIFF'S WORK ASSIGNMENTS [7]

Plaintiff argues that he was given on-call duties and less desirable programming assignments because of his race and national origin. Plaintiff also claims that he was given assignments by Malinowski who had previously directed racial comments towards plaintiff. However, Plaintiff has failed to adouce sufficient facts to substantiate this claim. First, plaintiff has failed to present any facts that would show that other similarly situated employees were treated differently. In fact, plaintiff's own submissions demonstrate that he shared on-call duties with his non-Chinese colleagues. (Tam Aff., Ex. 18.)

With respect to programming assignments, plaintiff states in his deposition that non-Chinese co-workers Rogers and Malinowski were also given programming duties. (Zimmerman

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[7] Many of plaintiff's allegations relating to unfair work assignments occurred more than 300 days before plaintiff's filing of his EEOC charge. As a result, these allegations are time-barred pursuant to 42 U.S.C. 2000e-5(e); Fuchilla v. Prockop, 682 F. Supp. 247, 257 (D. N.J. 1987).

Aff., Ex. C: Tam Dep. at 284-85.) While plaintiff may have preferred analysis assignments, there is no dispute that programming was within plaintiff's job description. (Tam Aff., Ex. 54: Job Description.) Plaintiff also concedes that Malinowski was not his supervisor, even if he occasionally distributed the work assignments. (Id., Exs. 17: Malinowski memo, 50: Kieffer memo.) Nor has plaintiff called into doubt Continental's business decisions in assigning programming work, i.e., that when plaintiff arrived to the Neptune office, Blumberg, Draper and Mazolic were already performing analysis work. (See Tam Aff., Exs. 11, 12, 35, 48.) Based on these findings, the court will grant defendant's motion for summary judgment on the claim that plaintiff was discriminatorily assigned work assignments.

PLAINTIFF'S 1991 EVALUATION

Plaintiff argues that his 1991 performance review, despite receiving the same rating as the prior two years, was discriminatory because it failed to recognize his overtime and that only plaintiff was required to submit overtime sheets. Also, plaintiff regards his superior's suggestion on the evaluation that he work harder as evidence that his overtime work was ignored. However, plaintiff has failed to produce sufficient facts that could lead a reasonable factfinder to conclude that these actions were motivated by a discriminatory animus.

Plaintiff has produced no evidence, apart from his own assertions, that his non-Chinese colleagues were not required to report their overtime. Nor is overtime ever mentioned in his generally positive evaluation. (Zimmerman Aff., Ex. G: Tam 1991 performance review at 5.) The fact that plaintiff was having difficulty with his programming work and yet still received the same rating as in prior years undercut his claim that this particular evaluation was based on discriminatory intent. The court therefore finds that plaintiff has failed to carry his

burden to show that the evaluation, if unfair, was motivated by plaintiff's ancestry and not his work performance. See St. Mary's Honor Center v. Hicks, — U.S. at —, 113 S.Ct. at 2748; Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).[8]

DENIAL OF PROMOTION

In order to establish a prima facie case under Title VII for discrimination in a failure-to-promote case, a plaintiff must demonstrate that: he belonged to a protected category; that he applied for and was qualified for the promotion; that he was denied the promotion; and that the position remained open to candidates of plaintiff's qualifications or that a member of a non-protected class received the promotion. McDonnell Douglas,

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[8]As the Court stated in Fuentes:

> To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. . . . Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons. While this standard places a difficult burden on the plaintiff, [i]t arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.

Id. at 765.

411 U.S. at 802, 93 S.Ct. at 1824; Molthan v. Temple University, 778 F.2d 955, 961 (3d Cir. 1985).

Plaintiff claims that he was discriminatorily denied the promotion to the first Quality Assurance position due to plaintiff's race and national origin. However, it appears clear that the person ultimately chosen for the position, who was also a member of a protected class, had qualifications for this position which plaintiff lacked, and was available immediately. (Zimmerman Aff., Ex. F: Bilotti Certification.) Thus, plaintiff's competitor for the position was better qualified. Plaintiff's subsequent selection for another quality assurance position, and the ultimate elimination of the position of both employees in the December 1991 Reduction in Force, also tends to undercut plaintiff's claims of discrimination. In sum, there appears to be insufficient evidence of a genuine factual dispute to withstand defendant's motion for summary judgment.

DENIAL OF TRAINING

Plaintiff claims that he was denied training opportunities while his non-Chinese colleagues were not. However, plaintiff has produced no factual evidence to support this claim. To the contrary, plaintiff admits that his supervisor, Kieffer, never told him that he could not take the class, and in fact, he continued to attend the class even after Kieffer expressed his objections to plaintiff not devoting 100% of his time to his work. (Zimmerman Aff., Ex. C: Tam Dep. at 412.) Nor can plaintiff produce any evidence to show that others similarly situated were treated differently. Nor can plaintiff specifically recall being told by Kieffer that he would be required to make up the time he spent at the class. (Id. at 493.) Because plaintiff has failed to show any genuine factual dispute, summary judgment is appropriate on this claim.

RETAILIATORY DISCHARGE[9]

Plaintiff claims that he was recruited for a position scheduled for elimination because of his race and national origin as well as in retaliation for filing an EEOC charge. However, this claim lacks sufficient factual support. Plaintiff has failed to show, for example, that he was treated any differently than his non-Chinese colleagues, either in applying for the Quality Assurance position or in the manner in which the elimination of the division was conducted. Plaintiff has not produce any evidence, beyond his conclusory allegations, that Continental acted in a discriminatory fashion. Nor has plaintiff refuted as pretextual Continental's explanation of these events. In such circumstances, summary judgment is appropriate. See Fuentes, 32 F. 3d at 765.[10]

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[9]Defendant maintains that this claim is administratively barred by plaintiff's failure to file a charge with the EEOC. (Def.'s Br. at 18.) Nevertheless, defendant argues that this claim lacks merit. As the Court finds that plaintiff cannot withstand summary judgment on this claim, it will not address whether the claim "grows out of" plaintiff's original EEOC charge.

[10] As stated in Fuentes, to survive summary judgment, plaintiff had either (i) to present sufficient evidence to meaningfully throw into question, i.e., to cast substantial doubt upon, Continental's proffered reasons for eliminating the Quality Assurance unit, or (ii) to come forward with sufficient evidence from which a factfinder could reasonably conclude that an illegitimate factor more likely than not was a motivating or determinative cause of this employment decision. Plaintiff has failed to raise a material issue of fact on either ground.

PLAINTIFF'S HARASSMENT CLAIM

To bring an actionable claim for harassment because of an intimidating and offensive work environment, a plaintiff must establish "by the totality of the circumstances" the existence of an environment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment." Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). Though mathematical precision is impossible, the court is urged to examine all the circumstances, including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 371.[11]

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[11] The standards for a hostile work environment are more frequently addressed in the context of sexual harassment. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3rd Cir. 1990). The court finds those standards also applicable here in the context of harassment based on national origin and race. Thus, in order to state a viable claim for hostile work environment under Title VII, a plaintiff must show: (1) the employee suffered intentional discrimination because of their race or national origin; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same race or national origin in that position; and (5) the existence of respondeat superior liability.
Id.

While the demarcation line between conduct that is "merely offensive" and "conduct which is severe or pervasive enough to create an objectively hostile or abusive work environment" is not entirely clear, the court finds that, after examining the totality of the circumstances, the alleged conduct in this case does not rise to the level of a Title VII violation. Though many of the comments directed at plaintiff were insensitive, distasteful and juvenile, the court notes that the "mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." Id. at 370 (internal quotation marks omitted). The alleged remarks were made in casual conversation, almost entirely by one co-worker, did not contain threats of any kind, and were not made with the kind of "contempt and cruelty commonly associated with racial slurs." Wall v. AT&T Technologies, 754 F. Supp. 1084, 1091 (M.D. N.C. 1990); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir.1981) ("no steady barrage of opprobrious racial comment"); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir.1977) (per curiam) ("derogatory ethnic comments ... were part of casual conversation and did not rise to the level [of] ... a violation of Title VII.")[12]. Moreover, none of these comments appear to have been intended to be offensive or hurtful. See York v. Mobil Oil Corp., 1991 WL 53337, Fair Empl.Prac.Cas.(BNA) 121, 57 Empl. Prac. Dec. 41, 123 (N.D.N.Y., 1991) ("The question here is not whether plaintiff

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[12] In Cariddi, the plaintiff sued for damages for a director's repeated references to him as a "dago." The director also further referred to other Italian-American employees as "mafia." The district court found that the comments were merely part of casual conversation and were not so numerous as to rise to a Title VII violation. The Eighth Circuit affirmed. Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir.1977).

understood the term to be racist, but whether the speaker meant it to be so").

In addition, plaintiff has not submitted evidence sufficient for a reasonable factfinder to conclude that the harassment was "so severe or pervasive as to alter the condition of plaintiff's employment and create an abusive working environment." Duplessis v. Training & Development Corp., 835 F.Supp. 671 (D. Me. 1993). In Duplessis , a Franco-American employee alleged harassment based on his French heritage. There the harassment consisted of: co- workers placing ceramic frogs on plaintiff's desk on separate occasions; leaving memos addressd to Frog on the plaintiff's desk, one attached to green earrings with the words "this is yours ... its even your color ... aren't real frogs brown?". The court was not satisfied that the incidents were "repeated and continuous" or that the incidents would be "offensive to a reasonable Franco-American." Id. at 678.

Similarly, plaintiff appears unable to show that these comments would have so detrimentally affected a reasonable person of Chinese descent as to alter the working conditions at Continental. As plaintiff concedes, many of these comments were made in the presence of other Asian employees and that plaintiff laughed at some of them. (Zimmerman Aff., Ex. C: Tam Dep. at 49-50, 55-58, 82-84, 87, 104-05, 108-110.) There is simply no evidence by plaintiff that other similarly situated employees would find these comments offensive to the degree required for a Title VII violation. In addition, there is insufficient evidence that any of these alleged comments resulted in any harm, subjective or objective, to plaintiff. Cf. Spain v. Gallegos, 26 F.3d 439 (1994) (harassment found where plaintiff produced "proof of injury directly flowing from the sexually hostile environment").

In addition, the court notes that it is unclear whether defendant "knew or should have known of the harassment and failed

to take remedial action." Andrews, 895 F.2d at 1486 (citations omitted). Plaintiff's deposition testimony indicates that he did not complain about the alleged discrimination. (Zimmerman Aff., Ex. C: Tam Dep. at , e.g., 62-68, 120-29.) Yet plaintiff's brief indicates, without citation to an affidavit or other competent evidence, that he did complain about discriminatory treatment. (Pl.'s Br. at 22.) This dispute is insufficient to withstand defendant's motion for summary judgment.[13]

In sum, plaintiff has failed to persuade the court that these relatively isolated comments rise to the level of a Title VII violation. Therefore, defendant's motion for summary judgment will be granted.

IT IS therefore on this 4th day of January, 1995, **ORDERED** that defendants' motion for summary judgment on plaintiff's Title VII harassment and discrimination claims (regarding plaintiff's work assignments, promotion, evaluation, training, potential transfer, and termination) be and is hereby **GRANTED**.

/s/ Mary Little Parell
MARY LITTLE PARELL
United States District Judge

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[13]Though not dispositive of the issue, the court notes that Continental maintained an internal grievance procedure to combat discrimination in the workplace, encouraged employees to report problems and emphasized its anti-discrimination policies by publishing a statement by Continental's Chairman and CEO in its company magazine. (Zimmerman Aff., Exs. A, B.)

Letter dated December 12, 1991

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEWARK AREA OFFICE
60 PARK PLACE
NEWARK, NJ 07102

Danny Tam
1 Pioneer Drive
Howell, NJ 07731

RE: Tam v. Continental Insurance Co
171-91-0793

Dear Mr. Tam:

I have reviewed your letter of December 2, 1991, to Mr. Martinez, of this office, regarding a request to rescind the Notice of Right to Sue issued to you on October 30, 1991.

I have decided not to rescind the Notice of Right to Sue .

I wish to remind you that if you wish to pursue your claim in court under Title VII of the Civil Rights Act of 1964, as amended, a lawsuit must be brought within ninety (90) days from the issuance of the Notice of Right to Sue.

Sincerely,

December 12, 1991
Date

/s/ Corrado Gigante
CORRADO GIGANTE
Area Director

Supreme Court, U.S.
FILED
MAR
FEB 27 1996
CLERK

No. 95-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANNY TAM,

Petitioner,

vs.

CONTINENTAL INSURANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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37pp

COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Third Circuit Court of Appeals was correct in affirming the judgment of the District Court that Petitioner failed to present evidence sufficient to create a genuine issue of material fact for trial with respect to his claims for employment discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended ("Title VII")?

PARTIES

1. Petitioner Danny Tam is a former employee of Continental Insurance Co.

2. Respondent Continental Insurance Co. ("Continental" or "Respondent") is an "employer" within the meaning of Title VII, 42 U.S.C. § 2000e(b). Continental has the following parent companies and subsidiaries:

(a) *Parent Companies*

The CNA Financial Corporation
The Continental Corporation

(b) *Subsidiaries of The Continental Corp.*

AFCO Agent Service Corporation
Bayside Management Company, Inc.
Bayside Reinsurance Company, Ltd.
Boston Old Colony Insurance Company
Buckeye Union Insurance Company (The) Buckhot, Inc.
CICAN I Investment Holding Company f/n/a
Continental Insurance Company of Canada
CICAN II Investment Holding Corporation f/n/a
Dominion Insurance Corporation (The)
Commercial Insurance Company of Newark, N.J.
Continental Center Associates
Continental Corporate Realty Services, Inc.
Continental Guaranty & Credit Corporation
Continental Holding Corporation
Continental Holding, Ltd.
Continental Insurance (International Agencies)
Australia Pty., Ltd.
Continental Insurance Company (Europe), Ltd. (The)
Continental Insurance Company (The)
Continental Insurance Company of New Jersey (The)
Continental Insurance Company of Puerto Rico (The)
Continental Insurance Holdings (Europe), Ltd. (The)
Continental International Insurance, Ltd.
Continental Life (Europe), Ltd.
Continental Life (International), Ltd.

Continental Lloyd's Insurance Company
Continental Loss Adjusting Services, Inc.
Continental Maiden Lane, Inc.
Continental Management Services, Ltd.
Continental Pacific (Australia) Holdings, Ltd.
Continental Pacific Insurance Company (Australia), Ltd.
Continental Re Management, Inc.
Continental Rehabilitation Resources, Inc.
Continental Reinsurance Corporation
Continental Reinsurance Corporation (U.K.), Ltd.
Continental Reinsurance Corporation International, Ltd.
Continental Reinsurance Management Company, Ltd.
Continental Reinsurance Management Holding Company, Ltd.
Continental Risk Services, Ltd. (Bermuda)
Continental Risk Services (Barbados), Ltd.
Continental Service Plan, Inc.
Continental Solution, Inc.
Continental Vision Financial Services, Inc.
CPI Group, Inc. (The)
CPI Pension Services, Inc.
Ctek, Inc.
Davis & Company Pty., Ltd.
East River Indemnity Company (Barbados)
East River Insurance Company, Ltd.
East River Insurance Company, Ltd. (Bermuda)
Fidelity and Casualty Company of New York (The)
Fireman's Insurance Company of Newark, N.J.
First Benefit Services, Inc.
First Fire & Casualty Insurance Company of Hawaii, Inc.
First Indemnity Insurance of Hawaii, Inc.
First Insurance Company of Hawaii, Ltd.
Foundation Insurance Agency, Inc.
Glens Falls Insurance Company (The)
Global Management Consultants, Inc.
Hongkong Fire Insurance Company, Ltd. (The)
Hull & Cargo Surveyors, Inc.
Hull & Cargo Surveyors, Inc. (Canada)
IDBI Managers, Inc.

J.M. Lydgate, Ltd.
Kansas City Fire and Marine Insurance Company
LCI Finance, Ltd.
Lombard Continental Insurance Holdings, Ltd.
Maiden Lane Syndicate, Inc. (The)
Marine Office of America (Deutschland), GmbH
Marine Office of America Corporation
Marine Office of America Corporation (Canada)
Marine Office of America Corporation (U.K.), Ltd.
Marine Office of America Corporation Italia, Spa.
Marine Office of Asia Corporation (Hong Kong), Ltd.
Master Capital Corporation
Mayflower Insurance Company, Ltd. (The)
MOAC Australasia, Ltd.
MOAC Insurance Managers (Singapore), Pte. Ltd.
National-Ben Franklin Insurance Company of Illinois
Niagara Fire Insurance Company
North Pearl Management, Inc.
Pacific Insurance Company
Pacific Underwriters, Inc.
Pension/Profit Sharing Systems, Inc.
Servicios y Comisiones Continental S.A. de C.V.
Settlement Options, Inc.
South Place Syndicate, Inc. (The)
TCC Acquisition Corporation
TCC Holdings, Inc.
TCC Properties, Inc.
UAM, Ltd.
United States P & I Agency, Inc.
Zeuxis Corp. VII

(c) *Minority-Owned Affiliates of The Continental Corp.*

Accord Holdings, Inc.
Accord Underwriting Agency, Ltd.
Asia Financial Holdings, Ltd.
Asia Insurance Co., Ltd.
Associated Aviation Underwriters
Bishophouse, Ltd. (Bermuda)
CRC Suramericana, S.A. (Venezuela)

Pan Malayan Insurance Corporation
Saudi Continental Insurance Company, E.C. (Saudi Arabia)

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No. 95-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANNY TAM,

Petitioner,

VS.

CONTINENTAL INSURANCE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent respectfully prays that the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 14, 1995 be denied.

OPINIONS BELOW

The Judgment Order of the Court of Appeals affirming the District Court's grant of summary judgment is attached hereto beginning at page 1a of the Appendix. The Order and Opinion of the District Court granting summary judgment in Respondent's favor is attached hereto beginning at page 3a of the Appendix. The decisions below were not officially reported.

STATUTES INVOLVED

Section 703 of Title VII provides:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

Section 704 of Title VII provides, in relevant part:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

STATEMENT OF THE CASE

Petitioner is a former employee of Continental whose employment was terminated in December 1991. Subsequent to his discharge, Petitioner, who is Chinese-American, brought a Title VII action against Continental alleging race and national origin discrimination, and retaliation. Specifically, Petitioner asserted that "[b]ecause of my race and national origin, I have been subjected to constant harassment, threatened to be terminated, [given] unfair job assignment[s], [and subjected to] denial of training opportunit[ies], unfair disciplinary action, denial of proper salary increases and other unfair terms and conditions [of] employment. In retaliation for my filing charges with the EEOC, I was selectively recruited to a

department slated for imminent termination." (Complaint ¶ 9(D).)

In its Answer, Continental denied all of Petitioner's allegations of wrongdoing and interposed numerous defenses. Discovery ensued, including the depositions of Petitioner and several Continental employees and document production by both parties. Each party also responded to interrogatories propounded by the other. At the conclusion of discovery, Continental filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), seeking dismissal of the Complaint in its entirety. The motion was opposed by Petitioner, who was represented by legal counsel. On January 4, 1995, the United States District Court for the District of New Jersey (Parell, J.) issued an opinion and order granting Continental's motion for summary judgment and dismissing the Complaint in its entirety. (Appendix ("App.") at p. 3a, *et seq.*) The District Court held that there was no evidence from which a reasonable jury could find that Continental discriminated against Petitioner based on his race or national origin, or that Continental unlawfully retaliated against Petitioner. (App. at pp. 10a-19a.)

After considering the evidence presented in the light most favorable to the Petitioner and applying the appropriate legal standards, the District Court concluded as follows:

(1) With respect to the claim of discriminatory transfer, Petitioner did not adduce evidence of either less favorable treatment than his non-Chinese colleagues or of any discriminatory motive underlying his selection for possible transfer. (App. at p. 11a.)

(2) With respect to the claim of discriminatory work assignments, Petitioner's non-Chinese colleagues also received the types of assignments of which Petitioner complained, the duties to which Petitioner objected were within his job description, and Petitioner failed to produce evidence refuting Continental's legitimate business reasons for making those assignments. (App. at p. 12a.)

(3) With respect to the claim of discriminatory performance evaluation, there was no evidence of discriminatory animus given that, *inter alia*, the evaluation was generally positive and Petitioner received the same ratings as in prior years notwithstanding his undisputed difficulty performing the work assigned to him during the evaluation period. (App. at p. 13a.)

(4) With respect to the claim of discriminatory denial of promotion, there was insufficient evidence of discrimination since the person chosen for the position was a member of a racial minority class, was better qualified than Petitioner, and was available for the position immediately, unlike Petitioner. (App. at p. 14a.)

(5) With respect to the claim of discriminatory denial of training opportunities, Petitioner had not been denied the training in question, and there was no evidence that similarly situated non-minorities were treated differently than Petitioner with respect to training. (App. at pp. 14a-15a.)

(6) With respect to the retaliation claim, Petitioner was not treated differently than his non-Chinese colleagues in connection with his transfer and the elimination of his unit, Continental did not act in a discriminatory manner, and there was no evidence that Continental's explanation of these events was pretextual. (App. at p. 15a.)

(7) With respect to the harassment claim, the alleged verbal harassment of which Petitioner complained did not give rise to a Title VII violation under the "totality of the circumstances" test enunciated in *Harris v. Forklift Systems, Inc.*, because it was not sufficiently severe and pervasive as to alter the conditions of Petitioner's employment and create an abusive working environment. (App. at pp. 16a-19a.)

Petitioner subsequently appealed *pro se* to the Court of Appeals for the Third Circuit. After undertaking a *de novo* review of the record and applying the appropriate legal standards, the Court of Appeals on November 14, 1995 issued a Judgment Order affirming the District Court's grant of

summary judgment. (App. at pp. 1a-2a.) Petitioner filed a Petition for a writ of *certiorari* in this Court on February 26, 1996. Respondent received a copy of the Petition on February 26, 1996.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED

This employment discrimination case under Title VII does not involve any special, important or novel legal issues warranting Supreme Court review. Both the District Court and the Court of Appeals applied the appropriate and well-recognized legal standards for evaluating Title VII claims and motions for summary judgment, as enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary's Honor Ctr. v. Hicks*, __ U.S. __, 113 S.Ct. 2742 (1993), *Harris v. Forklift Systems, Inc.*, __ U.S. __, 144 S.Ct. 367 (1993), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). (*See* App. A at pp. 10-11, 18.)

None of the circumstances under which the Court will consider granting *certiorari* exists in this case. The decision of the Court of Appeals does not conflict with the decision of another Court of Appeals on the same matter. Nor has the Court of Appeals decided a federal question in a way that conflicts with a state court of last resort or the applicable decisions of this Court. Neither the Court of Appeals nor the District Court departed from the accepted and usual course of judicial proceedings. In addition, this case does not involve any important questions of federal law that have not been, but should be, settled by this Court. *See* Rule 10 of the Supreme Court of the United States.

The petition for *certiorari* challenges primarily the District Court's[1] application of the "totality of the circumstances" test

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[1] Because the Court of Appeals affirmed the District Court's decision without opinion (App. at pp. 1a-2a), Respondent presumes for purposes of

(Footnote continued)

in determining whether the alleged harassment of Petitioner rose to the level of a Title VII violation. *See Harris v. Forklift Systems, Inc.*, __ U.S. __, 144 S.Ct. 367 (1993). (Petition at p. i (Questions Presented nos. 1, 2, 5).)

First, Petitioner contends that the District Court did not apply the totality of the circumstances test properly because it required him to satisfy additional elements not found in *Harris*. (Petition at pp. 10-11.) A review of the District Court's opinion shows that it applied the *Harris* standards correctly. In addressing Petitioner's harassment claim, the District Court quoted *in hac verba* from *Harris*, stating:

> To bring an actionable claim for harassment because of an intimidating or offensive work environment, a Petitioner must establish "by the totality of the circumstances" the existence of an environment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). Though mathematical precision is impossible, the court is urged to examine all of the circumstances, including:
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> > the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonable interferes with work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the Petitioner actually found the environment abusive. But while psychological harm, like any other relevant factor, may be

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these proceedings that the Court of Appeals' affirmance rests on the same grounds as the decision of the District Court.

> taken into account, no single factor is required.
>
> *Id.* at 371.

(App. at p. 16a.) The District Court applied these standards to the facts alleged by Petitioner and concluded that, as a matter of law, the alleged conduct did not "rise to the level of a Title VII violation." (App. at pp. 16a-19a.) Petitioner was not required to establish any elements or offer any proof inconsistent with *Harris*. (*Id.*)

Second, Petitioner argues that the District Court erred when it considered the intent of the individual who made the alleged harassing comments. (Petition at pp. i (Question Presented no. 2), 11.) Petitioner contends that considering the intent of the alleged harasser contradicts the "reasonable person" standard stated in *Harris*. (*Id.*) ("It suffices to prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to 'make it more difficult to do the job.'") The fact that the District Court considered the intent of the individual who made the alleged harassing comments as a factor in its analysis does not contravene *Harris*. Rather, it comports with *Harris*' instruction to examine the "totality of the circumstances." The intent of the alleged harasser was but one of many factors considered by the District Court in concluding that the conduct complained of by Petitioner did not rise to the level of actionable harassment under Title VII. (App. at pp. 16a-18a.) In reaching its conclusion, the District Court considered the point of view of the "reasonable person." The court extensively examined whether the alleged comments "would have so detrimentally affected a reasonable person of Chinese descent as to alter the working conditions at Continental." (App. at p. 18a.)

Because the courts below applied the appropriate standards in examining Petitioner's claim of hostile environment harassment, as enunciated in *Harris*, Petitioner's request for *certiorari* should be denied.

The other questions presented by Petitioner concern the standards and procedures applied by the District Court regarding summary judgment. Petitioner contends that the District Court's requirement that he produce evidence supporting his assertions of discrimination "places an undue burden on 'Title VII' Petitioners in summary judgment proceeding[s]." (Petition at pp. i (Question Presented no. 4), 8-9.) However, the District Court applied the appropriate standards for evaluating motions for summary judgment. (App. at p. 9a) ("A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact.") (citing Fed.R.Civ.P. 56(c) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).[2] Based on those standards, the District Court correctly held that Petitioner could not defeat summary judgment solely on the basis of his own unsupported testimony that he was discriminated against. *See also St. Mary's Honor Ctr. v. Hicks*, __ U.S. __, 113 S.Ct. 2742 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Petitioner also challenges the District Court's briefing practice on motions for summary judgment. Specifically, Petitioner contends that the District Court's practice of permitting the moving party to submit a moving brief and a reply, while the nonmoving party may only submit a brief in opposition, denied him the right to rebut the nondiscriminatory reasons offered by Continental for its actions. (Petition at pp. i (Question Presented no. 3.), 12-14.) Petitioner has no legitimate basis for challenging this briefing practice. The same practice is commonly used throughout the District Courts of the United States, and is the accepted and usual course of

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[2] In *Anderson*, the Court held that "a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 248 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) (plaintiff cannot avoid summary judgment "without any significant probative evidence tending to support the complaint."))

judicial proceedings. Further, Petitioner had a full opportunity to present all of his evidence of discrimination in his papers opposing Continental's motion, and, in any event, never sought leave of court to file a surreply brief. To the extent Petitioner alleges he was unable to present certain arguments as a result of the District Court's briefing procedure, he had the opportunity to raise those arguments before the Court of Appeals.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the petition for a writ of *certiorari* to review the decision of the Third Circuit Court of Appeals be denied in its entirety.

Dated: March 26, 1996

Respectfully submitted,

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Judgement Order of the Court of Appeals Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5098

DANNY TAM,

Appellant

v.

CONTINENTAL INSURANCE

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 92-cv-00411
(Honorable Mary Little Parell)

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 14, 1995

Before: BECKER and SCIRICA, *Circuit Judges*
and COHILL, *District Judge**

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* The Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered January 9, 1995, be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ Anthony J. Scirica

Circuit Judge

Attest:

/s/ P. Douglas Sisk

P. Douglas Sisk, Clerk

Memorandum and Order of the United States District Court for District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANNY TAM,

CIVIL ACTION NO.:92-411(MLP)

Plaintiff,

v. **MEMORANDUM AND ORDER**

CONTINENTAL INSURANCE

Defendant.

PARELL, District Judge

This matter comes before the Court on motion of defendant for summary judgement pursuant to Fed. R. Civ. P. 56(c). Plaintiff opposes the motion. For the reasons stated, the motion is granted.

BACKGROUND

On January 30, 1992, plaintiff Danny Tam ("plaintiff"), a Chinese-American, filed a Complaint against his former employer, the Continental Insurance Company ("Continental" or "defendant") alleging, *inter alia,* race and national origin discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C.A. §§ 2000e to 2000e-17 (1981 & Supp.1994).[1] Plaintiff worked for

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[1] Section 703 of Title VII provides: It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hore or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviledges of employment, because of such individual's ... race ... national origin ... 42 U.S.C.A. §2000e-2(a)(1) (West 1981). Section 704 of Title VII provides: It shall be an unlaful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice

(Footnote continued)

Continental from July, 1988 until December, 1991, when plaintiff's entire unit was eliminated due to an economically-necessitated reduction in force. The Complaint alleges that, while at Continental, Plaintiff was subjected to constant harassment, denied promotions, training opportunities and salary increases and was given unfair job assignments. (Complaint 9-10). Plaintiff claims that this treatment was due to his race and national origin. (*Id.*) Defendant has moved for summary judgment on plaintiff's claims, arguing that: the retaliatory discharge claim is statutorily barred for failure to file with the EEOC; plaintiff is unable to establish a *prima facie* case of discrimination; even if plaintiff can make out a *prima facie* case, defendant has put forth legitimate nondiscriminatory reasons for its employment decisions.

This court has jurisdiction of this matter under federal question jurisdiction pursuant to 28 U.S.C. 1331.

FACTS

Plaintiff Danny Tam is a Chinese-American who was born in Hong Kong and moved to the United States when he was six years old. (Affidavit of Sandra L. Zimmerman ["Zimmerman Aff."], Exhibit C: Deposition of Danny Tam, at 5, 137.) In July, 1988, plaintiff began work at Continental's Cranbury, New Jersey, office as a grade 45 Consultant Programmer/Analyst in the Investment Services Group ("ISG"). (*Id.* at 37-38.) Plaintiff originally worked on a computer project called IMIS. The team consisted of Project Manager Martin Felder, outside consultant Don Kieffer, analyst Mark Rogers, and plaintiff. When Felder left the group in December 1988, Kieffer replaced him as project manager. In April, 1989, Mike Malinowski, another analyst, joined the IMIS group. Felder (and subsequently) Kieffer served as plaintiff's superiors. (Id. at 35, 41, 51, 139).

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made an unlawful employment practice . . . or because he has made a charge . . . under this subchapter. *Id.* §2000-3(a) (West 1981).

Plaintiff contents that Malinowski frequently directed derogatory racial remarks at plaintiff.[2] Plaintiff also contends that his supervisors condoned these remarks and gave plaintiff the least desirable work assignments. (Pl's Br. at 3-4.)

In the summer of 1990, the IMIS team moved to Continental's Neptune, New Jersey, office to join the rest of Continental's Investment Services Group. At that time, Kieffer became supervisor of additional employees who were performing both programming and analysis work. Tam was given substantial programming work even though he expressed interest in

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[2] Plaintiff's co-worker, Malinowski, allegedly made the following comments: (a) at a meeting of plaintiff, Kieffer, Rogers and Malinowski, Malinowski said "you know how sneaky orientals think"; (b) after Tam told a joke, Malinowski remarked, "great, we got a Chinese comedian here"; (c) Malinowski stated that in 1989, plaintiff had "pearl-harbored" Malinowski's vacation; (d) Malinowski mocked a Chinese accent and said "call me master Tam"; (e) Malinowski asked Tam at a Christmas party whether they celebrate Christmas in China; (f) Malinowski twice joked that if Continental cancelled the computer project, Tam could open a hot dog stand but only use slanted rolls; (g) Malinowski asked Tam to spell something and said, "imagine, I'm asking a guy from Hong Kong to help me with my spelling"; (h) Malinowski pulled back the corner of his eyes and said "I want to come in as Danny tomorrow"; (i) Malinowski stated during the Gulf War that the USA should "kill them all and let God sort it out"; (j) Malinowski told co-workers to watch out because the ISG vice-president, who is Asian, was Tam's gardener.

Plaintiff also contends that his supervisor Kieffer made the following comments: (a) asked whether Tam's wife was an athletic supporter; (b) stated that he could not distinguish between Japanese and Chinese culture; (c) joked about a auto accident Tam had in which Kieffer imagined Tam as an aviator yelling "Tora, Tora, Tora"; (d) laughed when Tam said "rule of dumb" instead of "rule of thumb." Also, plaintiff complained of an unnamed Continental official who referred to a yellow-bound regulatory report as the "yellow peril."

Plaintiff concedes that he laughed at or ignored all of these jokes except the "sneaky oriental" comment and the "pearl-harbored my vacation" comment. (Zimmerman Aff., Ex. C; Tam Dep. at 49-50, 55-58, 82-84, 87, 104-05, 108-110.) Plaintiff objected to the latter comment only because he objected to the suggestion that he cost Malinowski vacation days, which plaintiff contends was untrue. (*Id.* 105-06.)

doing analysis work instead. (Zimmerman Aff., Ex. C; Tam Dep. at 164-65.) Continental, however, contends that it had already assigned the analysis work to other employees who had experience that plaintiff lacked. (*Id.* at 42, 167, 314.) During this period, plaintiff's co-worker, Malinowski, arranged the "on-call" schedule and directed some of ISG's assignments. Plaintiff contends that Malinowski gave plaintiff the least desirable "on-call" times. (Pl's Br. at 6-7.)

Due to the consolidation of the IMIS team with the employees already at the Neptune office, Continental determined that the unit was overstaffed and that three individuals would be slated for transfer to other departments at Continental. (Zimmerman Aff., Ex. C: Tam Dep. at 329-330.) Plaintiff and two caucasians were chosen. Plaintiff objected to possible transfer because he feared he would not be able to perform other jobs. In October, 1990, Kieffer, plaintiff's supervisor, told him that he would not be transferred. The other two individuals were eventually transferred. (*Id.* at 273-74.)

Plaintiff continued to receive programming assignments as did other employees in the ISG unit. (Id. at 284-86.) Plaintiff complained that he was having difficulty with these assignments and would prefer doing analysis work instead. (*Id.* at 287-88, 92-94, 296-301.) Kieffer offered to help plaintiff and told him that others were also having difficulty. Plaintiff never complained that his assignments were related to his race or national origin. (Id. at 296-301.)

On July 10, 1991, plaintiff applied for a job in Continental's Quality Assurance division. He interviewed with Tony Bilotti, Assistant Vice President of the division. Bilotti suggested that plaintiff discuss the position with a few of the analysts in the division before continuing with the interview process. (*Id.* at 361-62.)

Several days later, on or about July 16, plaintiff received his annual performance review. Plaintiff received an overall score of 3 (in a 1-5 scale with 5 as highest score), which resulted in a 4% ($2,240.00) salary increase. (Zimmerman Aff., Ex. G: Tam 1991 performance review at 5.) Plaintiff had

previously received a score of 3 in 1989 and 1990 but his salary increases were higher ($3,000.00 in both years). Plaintiff's evaluation suggested that plaintiff should work harder. (*Id.*)

Plaintiff contends that his supervisor neglected to factor in his overtime work and did so deliberately because he knew plaintiff was applying for the Quality Assurance position. Thus, plaintiff argues that he received a discriminatory performance review in1991.[3] (Pl.'s Br. at 27.)

In an effort to improve his prospects for obtaining the Quality Assurance job for which he applied, plaintiff began a four-day training class on July 23, 1991. (Zimmerman Aff., Ex. C: Tam Dep. at 405-07.) When plaintiff returned to the office after the first day of the class, Kieffer, plaintiff's supervisor, publicly reprimanded plaintiff for not spending all his efforts on his assigned work, especially in light of his recent evaluation which encouraged plaintiff to work harder. (*Id.*) Nevertheless, plaintiff attended class the next day and the morning of the third day. On July 24, 1991, plaintiff discovered that he did not receive the Quality assurance position and dropped the class.[4] (Id. at 395-97, 405-07, 411-12.)

Plaintiff complained that the selection process for the quality assurance position was unfair, and on July 26, 1991, plaintiff met with Glenn Oppito, human resources manager, about his concerns. (Id. at 360-62.) On July 29, 1991, plaintiff also met with Barbara Burkepile, Assistant Vice-President of Human Resources. Burkepile explained to plaintiff that Bilotti believed plaintiff was not qualfied to proceed further in the interview process. (*Id.* at 358-59.)

Plaintiff also reported to Burkepile that he was unhappy with his programming assignments and that he felt more at

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[3] Two of plaintiff's white co-workers, Mark Rogers and Pearl Goldstein, received a 3+ for 1991. (Tam Affidavit, Exs. 9,31.)

[4] The position went to Gwen McGowan, a black female, who had previously worked with Bilotti. (Zimmerman Aff., Ex. C: Tam Dep. at 355.)

ease with analysis work. Burkepile set up a meeting with plaintiff's supervisor, Kieffer, to discuss these issues. When the three met sometime in August, 1991, Kieffer expressed his view that everyone at Continental was expected to work outside the area of their expertise for certain periods of time, and that Kieffer intended to give plaintiff analysis work in the future. (Id. at 386-389, 421-428.)

On August 29, 1991, plaintiff received for his signature his salary adjustment form which reflected the 4% ($2,240.00) increase. Plaintiff did not believe this was a fair evaluation and on August 12, 1991, he filed a EEOC charge alleging race and national origin discrimination[5] (Zimmerman Aff., Ex. M: EEOC charge.)

Later in August, 1991, plaintiff again met with Burkepile. Burkepile advised plaintiff that Bilotti had a different position available in Quality Assurance and that plaintiff ought to apply for it. (Zimmerman Aff., Ex. C: Tam Dep. at 425-26.) Plaintiff met with Bilotti about the position. Bilotti invited plaintiff to apply, which plaintiff did. (*Id.* at 429-30.) Plaintiff was offered the position on September 12, 1991. (Zimmerman) Aff., Ex. N: job offer.) Plaintiff accepted the position, which included an 11% salary increase, and became a member of the quality assurance unit effective September 30, 1991. (Zimmerman Aff., Ex. C: Tam Dep. at 82-83.)

In December, 1991, Continental decided to eliminate a number of units, including the Quality Assurance unit. As a result, plaintiff, McGowan (who received the first quality assurance position) and nine other employees, including eight Caucasian-Americans, lost their job position. (Zimmerman Aff., Exs. O & P.) The decision to eliminate the unit was made by Ken Burk, the Senior Vice President in charge of the Neptune, New Jersey office. Burke had never met plaintiff nor

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[5] Plaintiff requested the EEOC to forego administrative investigative of the discrimination charge and to issue plaintiff a Right to Sue Notice, which EEOC issued October 30, 1991. (Zimmerman Aff., Ex. Q: EEOC charge.) No other EEOC charge was filed by plaintiff.

was he aware of plaintiff's race or national origin. Plaintiff was offered the option of seeking employment elsewhere in the company but he refused (Zimmerman Aff., Ex. R: placement questionnaire.) Plaintiff left the company December 10, 1991 and obtained a job with Maritime Overseas Corporation in or about March, 1992. (Zimmerman Aff., Ex. C: Tam Dep. at 17-19.)

SUMMARY JUDGMENT STANDARD

A court shall enter summary judgment under Federal Rule of Civil Procedure 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In order to defeat a motion for summary judgment, the opposing party must establish that a genuine issue of material fact exists. *Jersey Cent. Power & Light Co. v. Lacy Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)); *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1983), the Supreme Court established a basic framework for analyzing the burdens of proof in employment discrimination cases.[6]

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[6] *McDonnell Douglas* implemented a three-pronged analysis, which is applicable in the summary judgment context and allocates the parties' burdens: (1) plaintiff must come forth with sufficient evidence to establish a prima facie case of discrimination; (2) if plaintiff succeeds in establishing a prima facie case, the burden then shifts to the defendant, who must articulate some legitimate, non-discriminatory reason for the employee's

(Footnote continued)

In *Fuentes v. Perskie*, 32 F.3d 759, 761-62 (3d Cir. 1994), the Court of Appeals for the Third Circuit addressed a plaintiff's burden to forestall summary judgment in employment discrimination cases in light of the United States Supreme Court's recent decision in *St. Mary's Honor Center v. Hicks*, --- U.S. ---, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993):

> The question before us is the proper standard for granting summary judgment in a claim arising under Title VII in the wake of the Supreme Court's decision in [*Hicks*]. In particular, we consider the evidence that a plaintiff, who has made out a *prima facie* case, must adduce to survive a motion for summary judgment when the defendant offers a legitimate reason for its employment action in a "pretext" employment discrimination case. We hold that, to do so, the plaintiff generally must submit evidence which: 1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Id.

DISCUSSION

Plaintiff contends that he suffered harassment and disparate treatment because of his race and national origin in connection with various employment decisions made by Continental. The court will examine these allegations initially to determine

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rejection; (3) if defendant is able to meet this burden, plaintiff must be given the opportunity to come forth with sufficient evidence to show that the legitimate reasons offered by the defendant should not be believed and that discrimination was a determinative factor for the adverse employment action. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1093-94 (1981).

whether plaintiff can establish a *prima facie* case, and , if so, whether defendant has articulated a legitimate nondiscriminatory reason for its decision. Should defendant articulate such reasons, the burden then falls upon plaintiff to point specific facts that could lead a reasonable factfinder to conclude that discrimination, and not the reasons forth by defendants, was the true reason for the employment decisions. *Chauhan v. M. Alfieri, Co., Inc.*, 897 F.2d 123, 127-28 (3rd Cir. 1990) ("the plaintiff seeking to defeat a summary judgment motion must produce or point to some evidence, in addition to the basic facts necessary to establish the *prima facie* case, indicating that the defendant's reason is pretextual.")

PLAINTIFF'S POTENTIAL TRANSFER

Plaintiff claims that he was singled out for involuntary transfer in July, 1990, when other non-Chinese colleagues were permitted voluntary transfer. Plaintiff also states that, had he been kept on the transfer list and not chosen by another department, he would have been discharged. (Pl.'s Br. at 28-29.)

The court finds that plaintiff has failed to establish a *prima facie* of discrimination based on these facts. Plaintiff admits that he was removed from the transfer list at his request. As a result, he was not treated less favorably than other employees in a non-protected class; in fact, he appears to have been treated more favorably. (Tam Aff., Ex. 15: "e-mail" printout regarding transfer.) Moreover, plaintiff states in his deposition that he was told he would not be discharged even if not chosen by another department. (Zimmerman Aff., Ex. C: Tam Dep. at 205.) Plaintiff has also failed to produce any factual evidence to suggest that the list was compiled with a discriminatory motive. In the absence of any facts that potential transfer was motivated by discriminatory animus, defendants motion for summary judgment is granted on this claim.

PLAINTIFF'S WORK ASSIGNMENTS[7]

Plaintiff argues that he was given on-call duties and less desirable programming assignments because of his race and national origin. Plaintiff also claims that he was given assignments by Malinowski who had previously directed racial comments towards plaintiff. However, Plaintiff has failed to adouce sufficient facts to substantiate this claim. First, plaintiff has failed to present any facts that would show that other similarly situated employees were treated differently. In fact, plaintiff's own submissions demonstrate that he shared on-call duties with his non-Chinese colleagues. (Tam Aff., Ex. 18.)

With respect to programming assignments, plaintiff states in his deposition that non-Chinese co-workers Rogers and Malinowski were also given programming duties. (Zimmerman Aff., Ex. C: Tam Dep. at 284-85.) While plaintiff may have preferred analysis assignments, there is no dispute that programming was within plaintiff's job description. (Tam Aff., Ex. 54: Job Description.) Plaintiff also concedes that Malinowski was not his supervisor, even if he occasionally distributed the work assignments. (*Id.*, Exs. 17: Malinowski memo, 50: Kieffer memo.) Nor has plaintiff called into doubt Continental's business decisions in assigning programming work, i.e., that when plaintiff arrived to the Neptune office, Blumberg, Draper and Mazolic were already performing analysis work. (See Tam Aff., Exs. 11, 12, 35, 48.) Based on these findings, the court will grant defendant's motion for summary judgment on the claim that plaintiff was discriminatorily assigned work assignments.

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[7] Many of plaintiff's allegations relating to unfair work assignments occurred more than 300 days before plaintiff's filing of his EEOC charge. As a result, these allegations are time-barred pursuant to 42 U.S.C. 2000e-5(e); *Fuchilla v. Prockop*, 682 F. Supp. 247, 257 (D. N.J. 1987).

PLAINTIFF'S 1991 EVALUATION

Plaintiff argues that his 1991 performance review, despite receiving the same rating as the prior two years, was discriminatory because it failed to recognize his overtime and that only plaintiff was required to submit overtime sheets. Also, plaintiff regards his superior's suggestion on the evaluation that he work harder as evidence that his overtime work was ignored. However, plaintiff has failed to produce sufficient facts that could lead a reasonable factfinder to conclude that these actions were motivated by a discriminatory animus.

Plaintiff has produced no evidence, apart from his own assertions, that his non-Chinese colleagues were not required to report their overtime. Nor is overtime ever mentioned in his generally positive evaluation. (Zimmerman Aff., Ex. G: Tam 1991 performance review at 5.) The fact that plaintiff was having difficulty with his programming work and yet still received the same rating as in prior years undercut his claim that this particular evaluation was based on discriminatory intent. The court therefore finds that plaintiff has failed to carry his burden to show that the evaluation, if unfair, was motivated by plaintiff's ancestry and not his work performance. *See St. Mary's Honor Center v. Hicks*, --- U.S. at ---, 113 S.Ct. at 2748; *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994).[8]

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[8] As the Court stated in *Fuentes*:

> To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. . . . Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory

(Footnote continued)

DENIAL OF PROMOTION

In order to establish a prima facie case under Title VII for discrimination in a failure-to-promote case, a plaintiff must demonstrate that: he belonged to a protected category; that he applied for and was qualified for the promotion; that he was denied the promotion; and that the position remained open to candidates of plaintiff's qualifications or that a member of a non-protected class received the promotion. *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824; *Molthan v. Temple University,* 778 F.2d 955, 961 (3d Cir. 1985).

Plaintiff claims that he was discriminatorily denied the promotion to the first Quality Assurance position due to plaintiff's race and national origin. However, it appears clear that the person ultimately chosen for the position, who was also a member of a protected class, had qualifications for this position which plaintiff lacked, and was available immediately. (Zimmerman Aff., Ex. F: Bilotti Certification.) Thus, plaintiff's competitor for the position was better qualified. Plaintiff's subsequent selection for another quality assurance position, and the ultimate elimination of the position of both employees in the December 1991 Reduction in Force, also tends to undercut plaintiff's claims of discrimination. In sum, there appears to be insufficient evidence of a genuine factual dispute to withstand defendant's motion for summary judgment.

DENIAL OF TRAINING

Plaintiff claims that he was denied training opportunities while his non-Chinese colleagues were not. However, plaintiff has produced no factual evidence to support this claim. To the contrary, plaintiff admits that his supervisor, Kieffer,

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> reasons. While this standard places a difficult burden on the plaintiff, [i]t arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decisionmaking by the private sector in economic affairs.

Id. at 765.

never told him that he could not take the class, and in fact, he continued to attend the class even after Kieffer expressed his objections to plaintiff not devoting 100% of his time to his work. (Zimmerman Aff., Ex. C: Tam Dep. at 412.) Nor can plaintiff produce any evidence to show that others similarly situated were treated differently. Nor can plaintiff specifically recall being told by Kieffer that he would be required to make up the time he spent at the class. (*Id.* at 493.) Because plaintiff has failed to show any genuine factual dispute, summary judgment is appropriate on this claim.

RETALIATORY DISCHARGE[9]

Plaintiff claims that he was recruited for a position scheduled for elimination because of his race and national origin as well as in retaliation for filing an EEOC charge. However, this claim lacks sufficient factual support. Plaintiff has failed to show, for example, that he was treated any differently than his non-Chinese colleagues, either in applying for the Quality Assurance position or in the manner in which the elimination of the division was conducted. Plaintiff has not produce any evidence, beyond his conclusory allegations, that Continental acted in a discriminatory fashion. Nor has plaintiff refuted as pretextual Continental's explanation of these events. In such circumstances, summary judgment is appropriate. *See Fuentes,* 32 F. 3d at 765.[10]

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[9] Defendant maintains that this claim is administratively barred by plaintiff's failure to file a charge with the EEOC. (Def.'s Br. at 18.) Nevertheless, defendant argues that this claim lacks merit. As the Court finds that plaintiff cannot withstand summary judgment on this claim, it will not address whether the claim "grows out of" plaintiff's original EEOC charge.

[10] As stated in *Fuentes,* to survive summary judgment, plaintiff had either (i) to present sufficient evidence to meaningfully throw into question, i.e., to cast substantial doubt upon, Continental's proffered reasons for eliminating the Quality Assurance unit, or (ii) to come forward with sufficient evidence from which a factfinder could reasonably conclude that an illegitimate factor more likely than not was a motivating or determinative

(Footnote continued)

PLAINTIFF'S HARASSMENT CLAIM

To bring an actionable claim for harassment because of an intimidating and offensive work environment, a plaintiff must establish "by the totality of the circumstances" the existence of an environment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). Though mathematical precision is impossible, the court is urged to examine all the circumstances, including:

> the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Id. at 371.[11]

While the demarcation line between conduct that is "merely offensive" and "conduct which is severe or pervasive

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cause of this employment decision. Plaintiff has failed to raise a material issue of fact on either ground.

[11] The standards for a hostile work environment are more frequently addressed in the context of sexual harassment. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990). The court finds those standards also applicable here in the context of harassment based on national origin and race. Thus, in order to state a viable claim for hostile work environment under Title VII, a plaintiff must show: (1) the employee suffered intentional discrimination because of their race or national origin; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same race or national origin in that position; and (5) the existence of respondeat superior liability. *Id.*

enough to create an objectively hostile or abusive work environment" is not entirely clear, the court finds that, after examining the totality of the circumstances, the alleged conduct in this case does not rise to the level of a Title VII violation. Though many of the comments directed at plaintiff were insensitive, distasteful and juvenile, the court notes that the "mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." *Id.* at 370 (internal quotation marks omitted). The alleged remarks were made in casual conversation, almost entirely by one coworker, did not contain threats of any kind, and were not made with the kind of "contempt and cruelty commonly associated with racial slurs." *Wall v. AT&T Technologies,* 754 F. Supp. 1084, 1091 (M.D. N.C. 1990); *Johnson v. Bunny Bread Co.,* 646 F.2d 1250, 1257 (8th Cir.1981) ("no steady barrage of opprobrious racial comment"); *Cariddi v. Kansas City Chiefs Football Club, Inc.,* 568 F.2d 87, 88 (8th Cir.1977) (per curiam) ("derogatory ethnic comments . . . were part of casual conversation and did not rise to the level [of] . . . a violation of Title VII.")[12]. Moreover, none of these comments appear to have been intended to be offensive or hurtful. *See York v. Mobil Oil Corp.,* 1991 WL 53337, Fair Empl.Prac.Cas. (BNA) 121, 57 Empl. Prac. Dec. 41, 123 (N.D.N.Y., 1991) ("The question here is not whether plaintiff understood the term to be racist, but whether the speaker meant it to be so").

In addition, plaintiff has not submitted evidence sufficient for a reasonable factfinder to conclude that the harassment was "so severe or pervasive as to alter the condition of plaintiff's employment and create an abusive working environment." *Duplessis v. Training & Development Corp.,* 835 F.Supp. 671 (D. Me. 1993). In *Duplessis* , a Franco-American

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[12] In *Cariddi,* the plaintiff sued for damages for a director's repeated references to him as a "dago." The director also further referred to other Italian-American employees as "mafia." The district court found that the comments were merely part of casual conversation and were not so numerous as to rise to a Title VII violation. The Eighth Circuit affirmed. *Cariddi v. Kansas City Chiefs Football Club, Inc.,* 568 F.2d 87 (8th Cir.1977).

employee alleged harassment based on his French heritage. There the harassment consisted of: co- workers placing ceramic frogs on plaintiff's desk on separate occasions; leaving memos addressed to Frog on the plaintiff's desk, one attached to green earrings with the words "this is yours . . . its even your color . . . aren't real frogs brown?". The court was not satisfied that the incidents were "repeated and continuous" or that the incidents would be "offensive to a reasonable Franco-American." *Id.* at 678.

Similarly, plaintiff appears unable to show that these comments would have so detrimentally affected a reasonable person of Chinese descent as to alter the working conditions at Continental. As plaintiff concedes, many of these comments were made in the presence of other Asian employees and that plaintiff laughed at some of them. (Zimmerman Aff., Ex. C: Tam Dep. at 49-50, 55-58, 82-84, 87, 104-05, 108-110.) There is simply no evidence by plaintiff that other similarly situated employees would find these comments offensive to the degree required for a Title VII violation. In addition, there is insufficient evidence that any of these alleged comments resulted in any harm, subjective or objective, to plaintiff. *Cf. Spain v. Gallegos,* 26 F.3d 439 (1994) (harassment found where plaintiff produced "proof of injury directly flowing from the sexually hostile environment").

In addition, the court notes that it is unclear whether defendant "knew or should have known of the harassment and failed to take remedial action." *Andrews,* 895 F.2d at 1486 (citations omitted). Plaintiff's deposition testimony indicates that he did not complain about the alleged discrimination. (Zimmerman Aff., Ex. C: Tam Dep. at , e.g., 62-68, 120-29.) Yet plaintiff's brief indicates, without citation to an affidavit or other competent evidence, that he did complain about discriminatory treatment. (Pl.'s Br. at 22.) This dispute is insufficient to withstand defendant's motion for summary judgment.[13]

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[13] Though not dispositive of the issue, the court notes that Continental maintained an internal grievance procedure to combat discrimination in

(Footnote continued)

In sum, plaintiff has failed to persuade the court that these relatively isolated comments rise to the level of a Title VII violation. Therefore, defendant's motion for summary judgment will be granted.

IT IS therefore on this 4th day of January, 1995, **ORDERED** that defendants' motion for summary judgment on plaintiff's Title VII harassment and discrimination claims (regarding plaintiff's work assignments, promotion, evaluation, training, potential transfer, and termination) be and is hereby **GRANTED.**

/s/ Mary Little Parell

MARY LITTLE PARELL

United States District Judge

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the workplace, encouraged employees to report problems and emphasized its anti-discrimination policies by publishing a statement by Continental's chairman and CEO in its company magazine. (Zimmerman Aff., Exs. A, B.)